DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220673 **DATE:** October 29, 1985

MATTER OF: James L. Clark, Jr., Plumbing & Heating Co., Inc.

DIGEST:

Protest of rejection of bid for failure to acknowledge a material amendment is dismissed notwithstanding agency's failure to send the amendment to the protester. There is no allegation of a deliberate attempt to exclude the protester from the competition, or that the agency's failure was more than an isolated oversight, and it appears competition was adequate to ensure a reasonable price.

James L. Clark, Jr., Plumbing & Heating Co., Inc. protests the rejection of its bid under invitation for bids (IFB) No. DACA41-85-B-0287, which the U.S. Army Corps of Engineers, Kansas City District, issued for water main replacement at Fort Leavenworth, Kansas. The agency rejected the protester's bid as nonresponsive for failure to acknowledge amendment No. 0001 to the IFB. We dismiss the protest.

Generally a bid that fails to contain an acknowledgment of a material amendment--that is, an amendment that has more than a trivial or negligible impact on price, or on the quantity, quality, or delivery requirements of the IFB--must be rejected as nonresponsive. See Jose Lopez & Sons Wholesale Fumigators, Inc., B-200849, Feb. 12, 1981, 81-1 CPD ¶ 97. In this case, the protester says that although it paid for and received the initial solicitation and should have been on the bidder's list, it did not receive any amendments "through neglect, oversight or for other reasons." The protester adds that the agency admits it failed to send the amendment to the firm. In addition, correspondence from the protester to the agency indicates that the protester is willing to perform the additional work required by amendment No. 0001 with no increase in its bid price. The increase in the cost of performance is not substantial, says the protester, and would not have affected its bid.

033623

We dismiss the protest under section 21.3(f) of our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985), because the protester's initial submission fails to state a valid basis for protest. Triple A Shipyards, B-218079, Feb. 6, 1985, 85-1 CPD ¶ 149.

Although the agency apparently failed to send the amendment to everyone to whom the IFB had been furnished, as required by Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208(a) (1984), we have generally refused to disturb a procurement where it is alleged after bid opening that a single bidder did not receive a material amendment. See Shah Construction Co., B-184418, Oct. 28, 1975, 75-2 CPD ¶ 258 (where the bidder's address was recorded on the bidder's list incorrectly). The reason is that the remedy in such situations would be to cancel the solicitation and solicit new bids, an action which is permitted only when there is some compelling reason for it. FAR, 48 C.F.R. § 14.404-1(a)(1). As a general rule, where the government obtains competition and will be able to contract for its needs at a reasonable price, the harm occasioned to a single bidder to whom an agency failed to send a material amendment is outweighed by the potential harm to the competitive bidding system from a resolicitation after exposure of bids and does not, therefore, justify cancellation. In this case, we understand the agency received five bids in response to the IFB, indicating that competition was sufficient to ensure reasonable prices. Triple A Shipyards, B-218079, supra.

The result is different where the agency deliberately attempts to exclude a bidder from the competition, Freedom Elevator Corp., B-199773, Dec. 18, 1980, 80-2 CPD ¶ 438, or where it otherwise appears that the agency's failure to send amendments to the protester was the result of something more than an isolated oversight. Andero Construction Inc., B-203898, Feb. 16, 1982, 82-1 CPD ¶ 133. Here, however, there is no indication that the agency's failure to send the amendment to Clark was anything but an isolated oversight.

Finally, the amendment the protester failed to acknowledge required the contractor to remove three fire hydrants and to plug and backfill the remaining line. The

amendment also changed the valve size. An IFB amendment is deemed to be material if it adds requirements to contract performance that were not contained in the original IFB. Doyon Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 CPD ¶ 194. Although the protester has argued that the changes were "insignificant in cost," it has offered no support for this. Moreover, the nature of the changes suggests that the contractor selected will incur additional cost in meeting the obligations imposed by the amendment. Of course, the determination as to the cost significance of an amendment may not be based on the valuation placed upon it by the bidder seeking a waiver after bid opening, Marino Construction Co., Inc., 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 167, for to do so would permit the bidder to decide once bids have been exposed whether or not to become eligible for award.

Since the protester's submission fails to establish a valid basis for challenging the agency's determination to reject the protester's bid as nonresponsive, we dismiss the protest.

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel